

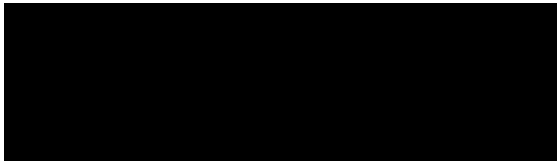
PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security

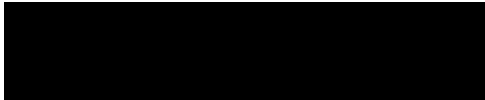
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



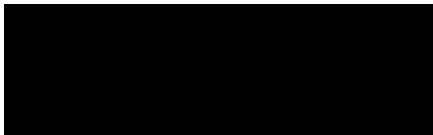
File: WAC 02 069 57200 Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 2004**

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant and bake shop that seeks to employ the beneficiary as a restaurant manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a) (15) (H) (i) (b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a restaurant manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 7, 2001 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: monitoring purchase orders; maintaining cost controls; planning the use of facilities; and analyzing statements, organizational charts, and workers' job duties. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree or the equivalent in the occupational field.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the submitted evidence did not demonstrate that the petitioner normally requires applicants to possess a bachelor's degree in the field. Finally, the director stated that the duties are mostly general managerial, and therefore, do not require professional skills.

On appeal, counsel states that, according to the *Handbook*, a bachelor's degree is the normal industry-wide requirement for entry into the proffered position because food service and restaurant chains prefer to hire a candidate with a bachelor's degree in restaurant and institutional food service management. When given the opportunity, counsel states that the industry will employ a candidate who has a bachelor's degree in the occupational field or in another field so long as the candidate has demonstrated interest and aptitude. Counsel also claims that the evidence in the record indicates that the petitioner normally requires applicants to possess a bachelor's degree in the occupational field. Counsel maintains that, because the restaurant manager would serve a specific market - Filipino specialty foods and bakery products - the proposed duties and level of responsibility clearly indicate complexity or authority

beyond what is normally encountered in the field. Counsel states that statements made by the court in *Matter of Caron Int'l, Inc.*, 19 I&N Dec.791 (Comm. 1988) are relevant here. Such as the finding:

However, the record does not demonstrate specifically how the proposed duties are so specialized and complex that a university-educated person is actually necessary. Nor has the petitioner established the beneficiary would be personally involved in unusually complex duties such as training, trouble-shooting complex equipment or systems problems, or negotiating complicated contracts which would make professional knowledge and background virtually indispensable.

Counsel claims that, had the petitioner in *Matter of Caron* proved that the duties were specialized and complex, the petitioner would have successfully established that the position is professional. Counsel states further that the case *Hong-Kong TV Video Program, Inc. v. Illchert*, 685 F. Supp. 712 (N.D. Cal. 1988), is more relevant than *Matter of Caron* as it is a federal district court case and the State of California is the jurisdiction. According to counsel, the court in *Hong-Kong TV* relied on *Matter of Sun*, 12 I&N Dec. 535-536 (Reg. Comm. 1967), to hold that the position of hotel manager is a profession because of the complexity of its duties, not the existence of a degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The language at Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires the "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Counsel's statement, that a bachelor's degree is the normal industry-wide requirement for entry into the proffered position because food service and restaurant chains prefer to hire a candidate with a bachelor's degree in restaurant and institutional food service management, is without merit given that one of the petitioner's letters states that the petitioner does not require a candidate to possess a bachelor's degree in a specific specialty. Specifically, the petitioner's letter of December 7, 2001 that accompanied the I-129 petition mentions:

Due to the professional nature of the services called for by the job description above-stated, we require of [the beneficiary] at least a bachelor's degree in any

field plus at least six (6) years of experience in the actual management and operation of a restaurant and bakery . . .

Counsel's letter, dated April 24, 2002, that responds to the request for evidence states:

In its letter to the INS, dated December 7, 2001, the petitioner stressed that due to the complexity of the duties to be performed, it wanted someone who has a bachelor's degree in any field . . .

Notwithstanding these letters, the document entitled "Food Service Manager, Job Description," also submitted in response to the request for evidence, states:

The job description above is so complex that it requires the services of a person who has a college degree or its equivalent in this particular occupation field.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

In accordance with the regulations and *Matter of Michelin Tire*, the AAO considers the petitioner's statements in the document entitled "Food Service Manager, Job Description," as coming into being subsequent to the filing of the petition in that the statements, made after the filing of the petition, expressly contradict the letter of December 7, 2001 that accompanied the petition. The AAO will, therefore, not consider the Food Service Manager, Job Description document in determining whether the proffered position is a specialty occupation. Instead, consideration will be given to the petitioner's letter of December 7, 2001. This letter states the petitioner's requirement for the proffered position: a bachelor's degree in any field plus at least six (6) years of experience in the management and operation of a restaurant and bakery. Based on the letter, the proffered position fails to qualify as a specialty occupation because the petitioner does not require a bachelor's degree in a specific specialty.

It is important to note that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given the fundamental discrepancies in the petitioner's statements, the probative value of all evidence in the record is questionable.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.